

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DIGNA BALLEENILLA-GONZALEZ,)

Petitioner,)

v.)

IMMIGRATION AND NATURALIZATION)
SERVICE,)

Respondent.)

76-4130

B
P/S

ON PETITION FOR REVIEW OF AN ORDER OF DEPORTATION
FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

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August 1976



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DIGNA BALLEÑILLA-GONZALEZ,)

Petitioner,)

v.)

IMMIGRATION AND NATURALIZATION)

SERVICE,)

Respondent.)

No. 76-4130

ON PETITION FOR REVIEW OF AN ORDER OF DEPORTATION
FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

Petitioner seeks review of an Order of Deportation issued by the Board of Immigration Appeals, Washington, D.C. The Order of Deportation issued December 4, 1975 which is unreported, is set out in the Joint Appendix at pages 2-5.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the denial of appointed counsel to an indigent alien at government expense in deportation proceedings violates an alien's right to due process under the Fifth Amendment.
- II. Whether the denial of appointed counsel to an indigent alien at government expense in deportation proceedings violates an alien's right to equal protection under the Fifth Amendment.
- III. Whether the government denied Petitioner her statutory right to retain counsel.
- IV. Whether the immigration judge's decision affirmed by the Board is arbitrary and capricious since it was based on insufficient findings of fact and not made in accordance with the law.
- V. Whether the decision of the Board of Immigration Appeals which provides for voluntary departure within thirty days of the Board's Order is an unconstitutional denial of due process and an abuse of discretion.

CONSTITUTION, STATUTES AND REGULATIONS

See Appendix to this brief, infra.

STATEMENT OF THE CASE

This is a petition for review of a final order of deportation brought by Digna Ballenilla-Gonzalez. On November 18, 1974, the immigration judge found petitioner was deportable under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), and denied her application for voluntary departure provided in Section 244(e) of the Act, 8 U.S.C. 1254(e). Petitioner appealed the order. On December 4, 1975, the Board of Immigration Appeals (hereafter the "Board") upheld the finding of deportability but reversed the denial of voluntary departure. (Jt. App. 2) Petitioner petitions this Court for review of the Board's finding of deportability and its grant of limited voluntary departure on the grounds that in so holding, I.N.S. violated her constitutional and statutory rights.

I.N.S. granted Petitioner, a citizen of the Dominican Republic, a non-immigrant student visa for the school year 1973-74. In September she entered the tenth grade at Antillian College, a private religious high school in Puerto Rico.

During Christmas vacation, Petitioner returned to the Dominican Republic to visit her family, and re-entered

the United States at San Juan, Puerto Rico on January 8, 1974.

Petitioner decided to visit relatives in Waterbury, Connecticut during the summer. Since her visa was to expire in May, she went to Monica de Lescay, an Antillian school official in charge of immigration matters, who agreed to file for a visa extension until September 13, 1974. (Jt. App. 6). It is an unresolved question of fact whether the extension was granted.

Petitioner, assuming that I.N.S. had granted her request, went to Connecticut. While there she received medical care at the Prenatal Clinic at Waterbury Hospital. Jacqueline Flynn, a social worker at the hospital, told Petitioner that because of her anemia and a positive tuberculin test, she should not travel to the Dominican Republic in September. (Jt. App. 7).

Dr. Michael R. Berman of the Waterbury Hospital, confirmed this diagnosis in a letter to the Immigration and Naturalization Service (Jt. App. 11). Again, Petitioner assumed her visa had been extended and her presence in this country was entirely legal. (Jt. App. 7). I.N.S., however, claims it never saw this letter until Petitioner presented a copy at the hearing in November 1974. (Jt. App. 8).

On October 8, 1974, Petitioner went to the I.N.S. office to report the birth of her son less than a month earlier, and to apply for an immigrant visa. Petitioner was interviewed by an I.N.S. investigator who subsequently advised her that she would have to return for another appointment and that she would be informed by letter of the date. (Jt. App. 7).

Instead of a letter, I.N.S. issued an Order to Show Cause and Notice of a Deportation Hearing alleging Petitioner had overstayed her original visa and that she, therefore, was deportable pursuant to Section 241(a)(2) of the Immigration and Nationality Act (Jt. App. 48). Although I.N.S. was aware that Petitioner spoke no English, the Order was written entirely in English. Not surprisingly, since Petitioner could not read the Order, she did not understand the Order's significance or the nature of the proceedings. (Jt. App. 8).

On November 18, 1974, a deportation hearing was held in Hartford, Connecticut, before an immigration judge. After a brief and confusing hearing where Petitioner was not represented by counsel, the judge concluded that she was deportable. The decision was based solely on Petitioner's admissions to the allegations in the Order to Show Cause

(Jt. App. 38). At the conclusion of the proceeding, Petitioner indicated her desire to appeal the decision and the immigration judge for the first time, informed her of the availability of free community legal services (Jt. App. 39-41).

Petitioner secured legal assistance through Waterbury Legal Aid and appealed the deportation decision to the Board. On December 4, 1975, the Board upheld the immigration judge's decision of deportability but reversed the denial of voluntary departure provided that Petitioner depart the United States within thirty days of the Order. (Jt. App. 2-5). If she failed to depart within this time, "the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the respondent shall be deported . . ." (Id. 5). Instead, Petitioner chose to exercise her statutory right to appeal the deportation order to this Court, thereby relinquishing her right to voluntary departure.

This appeal follows.

ARGUMENT

I. THE DENIAL OF APPOINTED COUNSEL TO AN INDIGENT ALIEN AT GOVERNMENT EXPENSE IN DEPORTATION PROCEEDINGS VIOLATES AN ALIEN'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT.

In a deportation hearing an alien "shall have the privilege of being represented . . . by such counsel, authorized to practice in such proceedings, as he shall choose"

8 U.S.C. §§1252(b)(2) and 1362 (1952).^{1/} Petitioner contends that these sections are constitutionally infirm since they limit the right to counsel and deprive the indigent alien of due process under the Fifth Amendment.

Specifically, Petitioner argues: (a) the Constitution requires the appointment of counsel for indigents in adversary proceedings initiated by the Government where liberty is at stake; and (b) the Government's failure to appoint counsel to Petitioner, either under a per se rule or case-by-case analysis, denied her due process under the Fifth Amendment to the Constitution.

^{1/} I.N.S. regulations use the term "right" of an alien to counsel. 8 C.F.R. §§242.2(a), 242.16(d) and 292.5(b). The legislative history accompanying the Act explains that the alien shall have the right of being represented by counsel . . . (emphasis added). U.S. Code Cong. and Adm. News 82nd Cong., 2d Sess. 1712 (1952).

A. The Constitution Requires Appointment Of Counsel For Indigents In Adversary Proceedings Initiated By The Government Where Liberty Is At Stake.

Courts have repeatedly acknowledged the gravity of the consequences of deportation and have characterized the stakes involved as "a critical and fundamental individual right." McLeod v. Peterson, 283 F.2d 180, 183 (3rd Cir. 1960); as "a drastic measure, at times the equivalent of banishment or exile" United States v. Lehmann, 239 F.2d 663 (6th Cir. 1956); as having "far more dire effects than imprisonment" United States v. Parrino, 212 F.2d 919, (2nd Cir. 1954); as resulting in "loss of both property or life; or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); and as "a great hardship on the individual which deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a serious one -- cannot be doubted." Bridges v. Wixon, 326 U.S. 154, 135 (1945).

Recognizing that "the liberty of an individual is at stake," the courts have stated consistently that due process of the Fifth Amendment requires that deportation proceedings comply with the "essential safeguards of fairness." Bridges v. Wixon, supra, at 154. The

Japanese Immigrant Case, 189 U.S. 86 (1903); Wong Yang Sun v. McGrath, 339 U.S. 33 (1950). Once it is determined that due process applies, there remains the more difficult question of the extent of the process that is due. Unlike other legal rules due process is a flexible concept. Hence, procedural requirements vary according to the specific factual context. E.g., Morrissey v. Brewer, 408 U.S. 471 (1972); Bell v. Burson, 402 U.S. 535 (1971); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

The stakes in a deportation proceeding are high: the alien's loss of liberty affects family, property and livelihood. While the gravity of loss may vary from alien to alien, one consequence is constant, the alien will be banished from the United States. Further, deportation hearings are complex adversary proceedings initiated by the federal government and supported by the vast resources of the public treasury. The alien, however, typically lacks financial resources, English language skills, education and basic understanding of

American legal institutions.^{2/} Where courts have found similar factual contexts, they have required appointment of counsel whether the proceedings were criminal, civil or administrative.^{3/}

The Supreme Court has held indigents entitled to counsel in all proceedings where personal liberty is at stake, even if potential confinement is as short as one day. These legal precedents developed from criminal cases. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

In Powell v. Alabama, supra, the Supreme Court

^{2/} Several commentators have written about these common characteristics. See, Gordon, Right to Counsel in Immigration Proceedings, 45 Minn.L.Rev. 875 (1961); Haney, Deportation and the Right to Counsel, 11 Harv.Inter.L.J. 177 (1970); Nelville and Campos, Statutory and Constitutional Problems in Immigration Law, 7 Colum.Human Rights L.Rev. 451 (1976); Comment, Due Process and Deportation - Is There A Right to Assigned Counsel? 8 Cal.Davis L.Rev. 289 (1975).

^{3/} The Washington Supreme Court described the plight of the poor when faced with judicial proceedings:

Not only do they [the poor] not know what remedies exist for wrongs done them and not only are they ignorant of the proceedings for evailing themselves of their remedies, but their attitude toward the courts is one of fear.

O'Connor v. Matzdorf, 458 P.2d 154, 160-1 (Wash.Sup. Ct. 1969).

held that the Sixth Amendment required appointment of counsel in capital cases "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like" 287 U.S. at 71. While the Court limited the holding to the facts before it, it did not rule out the possible extension of the right to counsel in "other criminal prosecutions, or under other circumstances" Id. (emphasis added).

The Supreme Court extended the right to appointed counsel to all felony cases in Gideon v. Wainwright, supra. The Court noted the inequality between the state which has vast sums of money to prosecute felonies and the defendant who is unable even to afford counsel.

[I]n our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him Government, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.

372 U.S. at 344.

Later, the Supreme Court, rejecting the felony/misdemeanor distinction, held that the right to counsel for indigents existed in any proceeding where a conviction could result in confinement. Argersinger v. Hamlin, supra. The critical factor, the Court found, was not the classification of the crime, but that liberty was at stake in a factually and legally complex proceeding, citing an earlier decision, In re Gault, 387 U.S. 1 (1967), as precedent for this decision. In Gault the Supreme Court held that due process required the appointment of counsel in a juvenile proceeding where the proceeding, although denominated civil, could result in the juvenile's confinement.

[T]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.

Id. at 36.

The year after Gault, the Tenth Circuit held that due process mandated the appointment of counsel in civil commitment proceedings. Heryford v. Parker,

396 F.2d 393 (10th Cir. 1968).^{4/} In Heryford, the court rejected a civil/criminal classification for determining the right to counsel and stated:

[W]e have a situation in which the liberty of the individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceeding be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration--whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment as a feeble-minded or mental incompetent--which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient person, -- the state . . . has the inescapable duty to vouchsafe due process and this necessarily includes the duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to have the guiding hand of legal counsel at every step of the proceeding, unless effectively waived by one authorized to act in his behalf.

Id. at 396. Thus, this case, like Gault, stressed the need for counsel where an individual is incapable of representing himself and the outcome of the proceedings would result in confinement.

Due process also requires the appointment of

^{4/} See also, In re Fisher, 313 N.E.2d 851 (Ohio Sup.Ct. 1974); Lynch v. Baxly, 386 F.Supp. 378 (M.D.Ala. 1974) (three-judge court); Lessor v. Schmidt, 349 F.Supp. 1078 (W.D.Wis. 1972); Dixon v. Attorney General, 325 F.Supp. 966 (M.D. Pa. 1971).

counsel in certain administrative proceedings. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Supreme Court held that counsel should be appointed in parole or probation revocation hearings where other minimum due process safeguards could only be guaranteed by such representation.

Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of the disputed facts

Id. at 786-87. The Court emphasized that the State would have to bear the costs of these proceedings since "the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate."

Id. at 788.

A number of courts have recognized the due process right to appointed counsel in proceedings to terminate parental rights. Reist v. Bay County Circuit Judge, 241 N.W. 2d 55 (Mich. Sup.Ct. 1976); Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); Lemaster v. Oakley, 203 S.E.2d 140 (W.Va. Sup.Ct. 1974); In re Adoption of R.I., 312 A.2d 601 (Pa.Sup.Ct. 1973); Danforth v. State Department of Health and Welfare, 303 A.2d 794 (Me.Sup.Ct. 1973); State v. Caha, 208 N.W. 2d 259 (Neb. Sup.Ct. 1973);

In re K., 105 Cal.Rptr. 209 (1972); In re B, 285 N.E.2d 288 (N.Y. 1972); In re Karren, 159 N.W.2d 402 (Minn.Sup.Ct. 1968); Chambers v. District Court, 152 N.W.2d 402 (Ia.Sup.Ct. 1967).^{5/}

In recognizing the right to appointed counsel in civil neglect proceedings, these decisions have stressed the nature of parental rights, and the gross imbalance of resources between the parent and the state.

B. The Government's Failure To Appoint Counsel For Petitioner Denied Her Due Process.

Petitioner contends that since the result of deportation proceedings parallels criminal confinement, civil commitment and termination of parental rights in its form and consequences, the Constitution requires the appointment of counsel to indigent aliens in those proceedings. Specifically, Petitioner maintains that she has a per se right to counsel. Alternatively, she argues that the appointment of counsel is required under

^{5/} See generally, Note, Child Neglect Due Process for the Parent, 70 Colum 1 Rev. 465 (1970); Catz & Kuelbs. The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Permination Proceedings Developing Area, 13 J. of Family Law 223 (1973).

the civil tests articulated in Gargon v. Scarpelli,
supra and recently embraced by the Fifth and Sixth
Circuits in deportation cases. Aquilara-Enriquez v.
I.N.S., 516 F.2d 565 (6th Cir. 1975) cert. denied
96 S.Ct. 776 (1976); Barthold v. I.N.S., 517 F.2d
689 (5th Cir. 1975); Lieggi v. I.N.S. 389 F.Supp.
12, 19 (N.D. Ill. 1975).

1. Petitioner has a per se right to counsel in a
deportation proceeding.

Petitioner argues that the due process clause
of the Fifth Amendment to the Constitution requires
the appointment of counsel for indigent aliens in
all deportation proceedings. An indigent alien
facing deportation needs the skill of an attorney
to frame defenses to rebut the government's evidence
and to guard against procedural irregularities. It
is hardly realistic to expect an uneducated, non-
English speaking alien to act as his own counsel.
Even the presence of an immigration judge does not
and cannot insure complete fairness at a deportation
proceeding since the judge often serves the dual

function of judge and prosecutor. ^{6/}

Absence of counsel cannot fail to have an adverse impact on the outcome of deportation proceedings. Studies have shown that the alien prevails in a far greater number of cases if he is represented by counsel. ^{7/}

The commentators found that there was a vast need for greater opportunities to be represented by counsel. These studies revealed that representation by counsel had a marked effect on the administrative proceedings, and that represented aliens prevailed in a far higher proportion of cases, since their counsel were much more effective in raising points of law, in questions of due process, in marshalling relevant evidence, and in advancing claims to United States citizenship.

Gordon, supra at 877.

Two Circuits have recognized that the absence of counsel in deportation proceedings is inherently prejudicial. Castaneda-Delgado v. I.N.S., 525 F.2d

^{6/} The government is usually not represented at a hearing by a trial attorney so that the immigration law judge must elicit the alien's plea plus any defenses to the allegation of deportability. If the alien denies the allegations of deportability, then a trial attorney is assigned to the hearing. 8 C.F.R. §§ 242.8 and 242.16.

^{7/} All these studies are discussed in Gordon, supra Wickershan Report, Report of the Ellis Island Committee, Report of the Secretary of Labor's Committee and the Van Vleck Report.

1294, 1300-02 (7th Cir. 1975); Chlomos v. I.N.S., 516 F.2d 310, 314 (3rd. Cir. 1975). In Casteneda-Delgado the Seventh Circuit held denial of counsel in deportation proceedings, like the denial of counsel in criminal cases, is reversible error that cannot be cured by a harmless error doctrine.

The alternative to a per se rule on right to counsel is an analysis of the facts and circumstances of each case, a view recently advanced in Gagnon v. Scarpelli, supra. This approach is analogous to the special circumstances test for the right to counsel in felony cases adopted in Betts v. Brady, 316 U.S. 455 (1942), and rejected in Gideon in favor of a per se rule. Petitioner contends that a case-by-case analysis of deportation proceedings would be equally ineffective in insuring fundamental fairness as it was in criminal prosecutions. Moreover, this approach requires courts to second guess the administrative record, intrudes on the operation of an agency of the executive branch and increases the workload of an already overburdened judiciary system.

Judge DeMascio in his strong dissent in Aquilera-Enriquez v. I.N.S., supra, pointed out the problems

inherent in the case by case analysis.

The majority had held that the right to counsel in deportation proceedings must be decided on a case-by-case basis under the tests articulated in Gagnon. In rejecting this position, Judge DeMascio acknowledged Congress' right to exclude aliens but found it "unconscionable for the government to unilaterally terminate the agreement without affording an indigent resident alien assistance of appointed counsel," 516 F.2d at 572.

Expulsion is such a lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow in In re Gault finding of delinquency No matter the classification, deportation is punishment, pure and simple.

Id.

Judge De Mascio distinguished deportation from parole or probation revocation proceedings where the Supreme Court has recognized the right to appointed counsel on a case-by-case approach only. He argued that in these administrative proceedings, the person stands convicted of an offense and the proceeding is

nonadversary. A deportation proceeding, on the other hand, is adversary in nature and the alien need not have a prior conviction.

Judge DeMascio then pointed out that adoption of the majority's test would require a reviewing court to second-guess the record made below " a record made without petitioner's meaningful participation." Id. at 573.

Moreover, I do not believe we should make the initial determination that counsel is unnecessary; or the lack of counsel did not prevent full administrative consideration of petitioner's argument; or that counsel could not have obtained a different administrative result. We should not speculate at this stage what contention appointed counsel could have raised before the immigration judge.

Id.

Therefore, Judge DeMascio concluded, as Petitioner concludes, that since the consequences of deportation are equivalent to punishment and a case-by-case test would rely on judicial speculation about what could have happened below, only a per se rule requiring appointment of counsel guarantees due process.

2. Petitioner was denied her constitutional right

to appointed counsel under the tests articulated in Gagnon v. Scarpelli.

In the alternative, Petitioner argues that she has a right to appointed counsel under Gagnon v. Scarpelli. In that case the Supreme Court held that parolees and probationers had the right to counsel where under the circumstances of the case "fundamental fairness--the touchstone of due process--will require that the State provide at its expense counsel for indigent probationers or parolees." 411 U.S. at 790. Some circumstances, however, require the appointment of counsel.

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation [T]he responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

411 U.S. at 677.

Petitioner falls within the second circumstance.

Moreover, Petitioner's limited education and inability to speak English made the presence of counsel critical. The Gagnon test was adopted in Aquilera-Enriquez v. I.N.S., supra. In so doing, the court noted that the Supreme Court's holdings in Gagnon and Gault have:

. . . . undermined [the] position that counsel must be provided to indigents only in criminal proceedings. Decisions such as Tupacypanqui-Marin and Mergia-Melendrez which contain dictum appearing to set forth a per se rule against providing counsel to indigent aliens facing deportation, rested largely on the outmoded distinction between criminal and civil proceedings . . . Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated.

516 F.2d at 568-69, n.3. (Citations omitted).

The Court then announced its test for determining whether due process required the appointment of counsel: "[I]n a given case, [would] the assistance of counsel . . . be necessary to provide 'fundamental fairness -- the touchstone of due process' Gagnon v. Scarpelli" 516 F.2d at 568. The Court concluded that since petitioner who in Aquilera-Enriquez was ordered deported for a drug conviction had

raised no defense to his conviction, the lack of counsel had not denied him fundamental fairness since "no defense for which a lawyer would have helped the argument was presented to the immigration judge for consideration." Id. at 569. See also, Barthold v. I.N.S., supra at 690-91 citing Aguilera-Enriquez and Gagnon approvingly.

In contrast, the hearing record in the instant case shows that Petitioner attempted to present a defense for her alleged overstay. After the immigration judge read the allegations to her, Petitioner attempted to explain that she had applied for an extension of her visa:

Q: Do you understand this charge that you are deportable because you were admitted to the United States as a student for a limited time and you have remained without authority for longer than that time?

A: I was going to ask the school for more time here and that they have to accept a letter and then they told me that it was alright.

Q: Do you understand the charge? We will come to a discussion about that in due course. Do you understand what the charge is in this paper?

A: Yes.

(Jt. App. 42).

Later, Petitioner attempted to explain how her doctor's letter extended her visa. (Jt.App. 41). The immigration judge refused to probe these inarticulate but obvious attempts to raise defenses. The record shows that only after the immigration judge ignored these attempts, did Petitioner admit various allegations in the Order to Show Cause. Her last admission constituted a legal basis for ordering her deported. All of the admissions were accepted in violation of I.N.S.'s own regulations. (See Argument IV infra.) Obviously, counsel was necessary in Petitioner's case to fully present and develop evidence in support of her defenses and to prevent procedural irregularities from depriving the proceeding of fundamental fairness.

In short, the lack of fundamental fairness in the proceeding made the appointment of counsel constitutionally necessary. The failure of the government to appoint counsel for Petitioner violated due process requirements set out in Gagnon and incorporated in Aguilera-Enriquez and Barthold.^{8/}

^{8/} This Court had the opportunity to decide the issue of right to appointed counsel for indigent aliens in deportation proceedings. Henriques v. I.N.S., 465 F.2d 119 (2d Cir. 1972), cert. denied 410 U.S. 968 (1973). However, since in that case there was a question of Petitioner's indigency, the Court declined to reach the issue. In this case, the immigration judge found Petitioner indigent, and on that basis denied her voluntary departure. (Jt. App. 44-45).

SUMMARY

Since personal liberty is involved in a deportation proceeding, the assistance of appointed counsel is required by the due process clause to assure aliens fundamental fairness. Gagnon v. Scarpelli, supra., Aguilera-Enriquez v. I.N.S., supra., and Barthold v. I.N.S., supra.

II. DENIAL OF APPOINTED COUNSEL TO AN INDIGENT ALIEN AT GOVERNMENT EXPENSE IN DEPORTATION PROCEEDINGS VIOLATES AN ALIEN'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT.

In Argument I, Petitioner contended that she had a right to appointed counsel under the due process clause of the Fifth Amendment. Here Petitioner argues that the statute creates a de facto wealth classification which invidiously discriminates against indigent aliens, who, like Petitioner, cannot retain counsel. Such a classification violates the equal protection guarantee inherent in the Fifth Amendment.

A. De Facto Wealth Classifications Affecting Individuals' Due Process Rights Are Unconstitutional.

While de facto wealth classifications are not per se unconstitutional, they must be strictly scrutinized when they interfere with the exercise of fundamental interests protected by the Constitution. Bullock v. Carter, 405 U.S. 134 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). Cf. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

Life, liberty and property are fundamental interests explicitly protected by the Constitution. Since these due process interests are at stake in criminal proceedings, the government cannot create a criminal justice system that even unintentionally adversely affects the fundamental rights of an indigent defendant. Griffin v. Illinois, supra. Douglas v. California, supra.

In Griffin, the Supreme Court held unconstitutional an Illinois statute which entitled convicted defendants appellate review provided they file a transcript with the appellate court. The cost of the transcript meant that "many [indigent defendants] may lose their life, liberty or property because of unjust convictions which appellate courts would set aside," Id. at 19. The Court pointed out that while the government was not obligated to provide an appeal, once it did it could not structure a system "in a way that discriminates against some convicted defendants on account of their poverty." Id. at 18. Justice Frankfurter's concurrence explained:

[W]hen a state deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent

persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review foreclosed.

Id. at 23.

The Supreme Court went further in holding that this right may not be denied by drawing a felony-misdemeanor distinction or by limiting it to those in which confinement is the penalty. Williams v. Oklahoma City, 395 U.S. 458 (1969) and Mayer v. City of Chicago, 404 U.S. 189 (1971) respectively.

In Mayer v. City of Chicago, supra, the Supreme Court rejected the city's argument that not being subject to imprisonment distinguished the case from Griffin and its progeny, and maintained that the city had misconceived the principle of Griffin.

Griffin does not represent a balance between the needs of the accused and the interest of society; its principal is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences they received. The state's fiscal interest is therefore irrelevant.

Id. at 196-97.

The Supreme Court extended its holding in Griffin to denial of counsel on a first appeal as of right from a criminal conviction. In Douglas v. California, supra, the Court rejected California's system that required an initial showing of merit before counsel would be appointed on appeal. The Court argued that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel . . . an unconstitutional line has been drawn between rich and poor." 372 U.S. at 357. In effect, the Court was saying that the right to appointed counsel was concomitant to recognition of a due process right to retained counsel.^{9/} As such, appointment of counsel cannot be

^{9/} In Cleaver v. Wilcox, supra, at 944 the Ninth Circuit in deciding that due process required the appointment of counsel for parents in dependency proceedings also noted that:

. . . a serious equal-protection question is raised when the state concedes that wealthy parents with retained counsel can turn the hearing into a formal adversary hearing. The Supreme Court has not yet decided the extent to which the equal-protection clause, under Douglas . . . and Griffin . . . provides a right to appointed counsel as a necessary concomitant of recognition of a due process right to retained counsel.

decided on a case-by-case basis which in itself is highly prejudicial to the rights of the poor person.

The Court explained:

The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to arguments of a counsel before deciding on the merits but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination of the record, research of the law and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 357-58.

In short, Griffin, Douglas, Williams and Mayer stand for the proposition that where interests protected by the due process clause are at stake, the government cannot structure a system to protect those interests that also has the effect of discriminating against individuals on the basis of their wealth. This flat prohibition exists even though

the government need not have initially created the system. The prohibition cannot be lifted by drawing a felony-misdemeanor distinction, by limiting it to those instances where confinement is the penalty, or by arguing that the government's fiscal interests legitimate the classification. And finally, the right to counsel cannot be conditioned on a showing of merit on a case-by-case basis.

B. Once Congress Has Created A Right To Retained Counsel In Deportation Proceedings, It Cannot Discriminate Against Aliens On The Basis Of Wealth.

Equal protection is inherent in the due process clause of the Fifth Amendment and thus applicable to the federal government. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Federal statutes cannot escape constitutional scrutiny for violations of equal protection. Thus, they must meet the tests established in Griffin and Douglas.

As advanced in Argument I, deportation proceedings are similar to criminal proceedings. Both are adversary in nature pitting the vast resources of the government against an individual with personal liberty

at stake. Moreover, an alien's threat of loss can be greater than the defendant's in a criminal prosecution, particularly a criminal misdemeanor case. Just as the criminal defendant has a right to a fair trial, the alien subject to deportation has a constitutional due process right to a fair hearing. Japanese Immigrant Case, supra, at 100-01.

In creating a statutory right to counsel, Congress like the states in Griffin and Douglas has established a statutory scheme for assuring due process and fairness in these proceedings. At the same time, the statute has conditioned that right on it "not being at government expense." Thus, the statute here, like the procedure in Griffin and Douglas creates wealth classifications which preclude indigents from exercising these rights.

Absence of counsel has an adverse impact on the outcome of the proceedings. (Argument I at 17). Clearly, this statutory scheme which makes the presence of counsel dependant upon the financial resources of the alien violates Petitioner's Fifth Amendment right to equal protection under Griffin and Douglas.

SUMMARY

This statutory scheme which makes the availability of counsel dependent upon the financial resources of the individual violates Petitioner's Fifth Amendment right to equal protection. Griffin v. Illinois, supra; Douglas v. California, supra.

III. THE GOVERNMENT DENIED PETITIONER HER STATUTORY RIGHT TO RETAIN COUNSEL.

Even if it were conceded that the due process clause of the Fifth Amendment does not require the appointment of counsel, the Immigration and Nationality Act itself provides an alien with a statutory right to counsel in a deportation proceeding. Petitioner maintains that she was denied her statutory right to retain counsel when the immigration judge failed to adequately explain the right to her, failed to inquire about her ability to secure counsel at her own expense, failed to inform her of the availability of pro bono legal services and finally, failed to offer to adjourn the hearing so she could seek legal assistance.

A. Aliens Are Entitled To Counsel In Deportation Hearings.

The Immigration and Nationality Act provides in two separate, but identical sections, that an alien may be represented by counsel in deportation proceedings. 8 U.S.C. §§ 1252(b)(2) and 1362. The regulations which implement these sections refer to the "right" of the alien to be represented by counsel of one's own choosing. 8 C.F.R. §§ 242.2(a), 242.16(a) and 292.5(b).

The Seventh Circuit in Castaneda-Delgado v. I.N.S. 525 F.2d 1295, 1302 (7th Cir. 1975),^{10/} recognized the absolute nature of this right when it refused "to indulge in 'nice calculations as to the amount of prejudice flowing from the denial,' or to apply the harmless error test."

[T]he right to be represented by counsel of their own choice granted to aliens in deportation proceedings by statute and regulation is too important and fundamental a right to be circumscribed by a harmless error rule

Id. at 1300.

B. The Government Has A Duty To Fully Inform Potential Deportees Of Their Right To Counsel.

I.N.S. regulations require the immigration judge to inform the alien of the right to counsel and, before proceeding with the hearing to get a statement from the alien on whether he or she wishes to be represented. 8 C.F.R. § 242.16(a). This regulation simply recognizes that the decision to proceed without counsel is a critical one -- one made only with full knowledge of the nature and consequences of the proceeding and an understanding of the importance of the right to counsel

^{10/} See also, Chlomos v. I.N.S., 516 F.2d 310 (3rd Cir. 1975).

The duty of the immigration judge to thoroughly inform the alien of this right was discussed in Hadlovits v. Adcock, 80 F.Supp. 425 (E.D. Mich. 1948), where petitioner asserted that she did not have a fair hearing since she was without counsel. The record indicated that the inspector had informed her of her right to counsel but she elected to proceed unrepresented. Id. at 427.

The court found that Petitioner's decision to proceed unrepresented was made without an understanding of the importance of counsel.

It was the duty of the examining officer to explain such an important right to a person, not in a perfunctory way but in a manner which would assure the alien fully understood her rights.

Id. at 428.

At Petitioner's hearing the immigration judge's explanation was no more adequate than the inspector's in Handlovits. Here Petitioner twice asked the presiding officer whether a lawyer was necessary. His offer to adjourn while she thought over her decision, hardly supplied her with the critical information which she needed to make an intelligent decision.

The hearing record reflects the immigration judge's failure to fully explain this right to petitioner. When the immigration judge attempted to determine whether petitioner wished to have counsel at the hearing her answers reflected confusion and uncertainty:

Q: Do you wish to have a lawyer or representative here, or do you wish to speak without a lawyer or representative?

A: Will there be a problem? I don't know.

Q: . . . Now, it's up to you as to whether you wish to have a representative here at the hearing. What do you wish to do?

A: Would it be better to have a lawyer?

Q: Well, I don't know what your case is. Now if you wish to have time to think it over we'll recess the hearing while you determine what you want to do?

A: I don't think there will be any problem. I don't think I need a lawyer.

(Jt. App. 40-41).

Immediately thereafter, the record reveals that petitioner neither understood the purpose of the proceeding nor its consequences. Since Petitioner speaks little English, she was unable to read the Show Cause Order and no one had read it to her. All she had been told was that the Order was important. (Jt. App. 42).

Petitioner's lack of understanding at the opening of the proceedings, along with the immigration judge's cursory explanation, in effect, denied Petitioner her statutory right to retain counsel.

Petitioner further asserts that the immigration judge should have determined at the outset of the hearing whether she was able to secure counsel at her own expense. If not, then she should have been informed of the availability of free community legal services.^{11/} Where an alien is informed of the right

^{11/}Some immigration judges inform indigent aliens of free legal services. *Siabia-Fernandez v. Rosenberg*, 302 F.2d 139 (9th Cir. 1962). A similar practice is used in the New York District Office of I.N.S. Multiple Accelerated Summary Hearings (M.A.S.H.), 20 INS 48 (April 1972). The I.N.S. procedure is designed:

. . . to accelerate the hearing and final determination of a limited class of deportation cases. By combining hearing techniques with standard courtroom procedures, the new program is designed to take full advantage of the adversary system with the Service represented by its Trial Attorney, and the respondent by Counsel. Even where respondents are not represented, by Counsel, the techniques used provide a greater facility for disposition . . .

Id. at 49.

Prior to the hearing, the government attorney speaks with the alien to ascertain whether he or she desires counsel.

to a lawyer without the corollary information that free counsel is available, if needed, the indigent alien is offered no choice at all.

C. The Government Had A Duty To Adjourn The Hearing To Give Petitioner The Opportunity To Obtain Counsel.

Finally, Petitioner contends that the immigration law judge should have adjourned the hearing to allow her to seek legal assistance. 8 C.F.R. §242.13 provides that after the hearing commences, the immigration judge:

"may grant a reasonable adjournment either at his own instance or, for good cause shown A continuance of the hearing for the purpose of allowing the respondent to obtain counsel shall not be granted more than once unless sufficient cause is shown"

The immigration judge in Siabia-Fernandez v. Rosenberg, supra, upon learning of the Petitioner's indigency, informed him of community legal service and continued

(footnote cont'd)

"By arrangement with the Legal Aid Society representation is available without cost to the aliens unable to afford counsel." Id. at 49. While this procedure obviously serves the ends of the Service, it also indicates that more can be done and is being done, to inform aliens of the right to counsel and to suggest where free counsel can be secured.

the hearing for a week so that Petitioner could obtain counsel. Where the presiding officer determines that the alien is unrepresented because of indigency, then he should, sua sponte, continue the hearing to allow the alien to secure counsel.

While the I.N.S. may be inconvenienced by a week's delay in the hearing, the long-range benefits to the Service are obvious. Most of the issues raised on appeal occur where the alien was unrepresented by counsel. An initial expenditure of time and resources at the hearing level would lead to the full development of the facts and any defenses. This would reduce the need for appeals and provide a complete record for review if an appeal is undertaken.

SUMMARY

The immigration judge had a duty to fully inform Petitioner of her statutory right to retain counsel and to adjourn the hearing to give her the opportunity to obtain counsel. The immigration judge's failure to carry out either duty denied Petitioner this right. Castaneda-Delgado, supra, and Chlomos, supra.

IV. THE IMMIGRATION JUDGE'S DECISION AFFIRMED BY THE BOARD IS ARBITRARY AND CAPRICIOUS SINCE IT WAS BASED ON INSUFFICIENT FINDINGS OF FACT AND NOT MADE IN ACCORDANCE WITH THE LAW.

The immigration judge's decision, affirmed by the Board of Immigration Appeals, was based solely on Petitioner's responses to questions on whether the factual allegations in the Order to Show Cause were true and whether she admitted she was deportable. These admissions reflect Petitioner's confusion about the proceedings and the allegations. Yet these responses form the only evidence of deportability.

Petitioner argues that the use of admissions as the sole evidence for her finding of deportability is not valid since her responses were not clear, convincing and unequivocal as required by law;^{12/} and the immigration judge's decision was arbitrary and capricious in that it was not based on sufficient findings of fact nor made in accordance with the law.

^{12/} It is interesting to compare the strict guidelines governing the acceptance of a guilty plea in criminal cases where the defendant has counsel and the procedure here. See *McCarthy v. U.S.*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969).

A. Petitioner's Admissions Of The Allegations Are Not Valid Since Her Responses Were Unclear, Equivocal And Unconvincing.

A determination of deportability "shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true." 8 C.F.R. § 242.14(a). Evidence can, however, consist of an alien's admissions where three prerequisites are met: the alien admits (1) "the factual allegations and . . . (2) his deportability . . . and (3) the immigration judge is satisfied that no issues of law or fact remain." 8 C.F.R. §242.16(b) (emphasis added). In Petitioner's case, none of these prerequisites were met.

In order to determine whether Petitioner's admissions of fact or law were valid, one must read 8 C.F.R. §242.16(b) against 8 C.F.R. §242.14(a) which establishes a general standard for testing the sufficiency of evidence in a deportation proceeding. This general standard requires that the evidence, here in the form of admissions, be clear, unequivocal and convincing.

The first prerequisite is that the alien admit the factual allegations. Petitioner's responses to

the factual allegations were neither clear, convincing nor unequivocal. Petitioner was generally confused and unaware of the nature of the proceedings. (Jt. App. 39-47).

In two instances her testimony indicates that she believed that her visa had been extended twice, by her school and through a letter from her doctor to I.N.S. (Jt. App. 41-42). On neither occasion did the immigration law judge probe these assertions. When Petitioner attempted to explain how the school told her "it was alright," the immigration judge cut her off, saying that they would "come to a discussion of that in due course." (Jt. App. 42). He never returned, however, to probe her explanation. Without this probing and the possible clarification it might have brought to the issue, Petitioner's factual admissions are equivocal, unclear and unconvincing.

The second prerequisite is that the alien admit deportability. Again, Petitioner's responses can hardly be called clear, convincing or unequivocal. While Petitioner admitted being deportable in response to the immigration judge's syllogistic question

(Jt. App. 43), she later asked the judge if he had to deport her (Jt. App. 45) and then even later in the proceedings stated that she did not believe herself to be deportable since her baby was born in this country.^{13/} (Jt. App. 46). Although these contradictions should be sufficient proof of Petitioner's equivocation as to admission of deportability, her affirmative response to the judge's inquiry as to whether she wished to appeal is a clear contradiction of such a legal admission. (Jt. App. 46). Therefore, there was no valid admission of deportability upon which to base a decision.

The final prerequisite to establish deportability based on admissions, requires that the immigration judge "is satisfied that no issues of law or fact remain." 8 C.F.R. §242.16 (a). Here it is impossible

^{13/} Requiring an admission of deportability forces aliens to make a legal conclusion. Although Petitioner's belief that the birth of her child prevented her deportation was incorrect, her claim is evidence of equivocation. If anything, it lends greater weight to Petitioner's attack on the validity of her admission of deportability. It demonstrates that any legal conclusion she could have drawn about her deportability was unknowing and further proof of the need for counsel in deportation proceedings.

to believe that a reasonable immigration judge, in the face of Petitioner's confused and contradictory responses, would have found that no issues of law or fact remained.

Since admissions of fact and law were invalid and, therefore, factual and legal issues remained, the immigration judge did not have the authority under 8 C.F.R. §242.16(b) to determine deportability based on such admissions.

B. The Immigration Judge's Decision Was Arbitrary And Capricious In That It Was Not Made In Accordance With The Law Nor Based On Sufficient Findings Of Fact.

Judicial review of an immigration law judge's decision is limited to whether procedural due process has been insured; whether the decision was reached in accordance with applicable rules of law; and, if there has been an exercise of administrative discretion, whether the exercise was arbitrary and capricious.

Castaneda-Delgado v. I.N.S., supra; Aalund v. Marshall, 461 F.2d 710, 711 (5th Cir. 1972); Jarecha v. I.N.S., 417 F.2d 220, 224-25 (5th Cir. 1969); Fernandez-Gonzalez, I.N.S. 347 F.2d 737, 740 (7th Cir. 1965); Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960), cert. denied,

365 U.S. 860 (1961). Moreover, once an administrative agency has promulgated a regulation, even in instances where it is not required to do so, that agency is bound to follow its regulation. Francis v. Davidson, 340 F.Supp. 351, 365-66 (D.Md. 1972), aff'd 409 U.S. 904 (1972).

As advanced in Part A, under 8 C.F.R. §242.16(b) the immigration judge could not properly conclude that Petitioner was deportable. Consequently, the decision finding Petitioner deportable was not made in accordance with I.N.S.'s regulations and, therefore, arbitrary and capricious.

Judicial review of findings of fact as to deportability includes inquiry as to whether the findings are supported by reasonable, substantial and probative evidence on the record considered as a whole. 8 U.S.C. §1105(a)(4). Since Petitioner's admissions were invalid, the Court must determine if the record as a whole without the admissions contains reasonable substantial and probative evidence. Absent Petitioner's admissions, this confusing and contradictory record contains no proof of deportability let alone reasonable, substantial and probative evidence. This unsubstantiated decision is, therefore, arbitrary and capricious.

SUMMARY

The immigration judge's decision affirmed by the Board is based solely on petitioner's admissions which were not obtained in accordance with I.N.S.'s own regulations. Petitioner's admissions were consequently invalid, leaving the decision unsubstantiated. Since the decision was, therefore, neither made in accordance with the law nor based on sufficient findings of fact, it was arbitrary and capricious.

V. THE DECISION OF THE BOARD OF IMMIGRATION APPEALS WHICH PROVIDES FOR VOLUNTARY DEPARTURE WITHIN THIRTY DAYS OF THE BOARD'S ORDER IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS AND AN ABUSE OF DISCRETION.

The Board of Immigration Appeals ordered that Petitioner be permitted to depart voluntarily from the United States at no expense to the government within thirty (30) days from the date of the Order. The Board's Order further stated that her failure to do so would result in the privilege of voluntary departure being withdrawn without further notice or proceedings, reinstating the original deportation order.

In this argument Petitioner contends that the Board's Order granting her voluntary departure if she exercised the option within thirty (30) days presented her with a Hobson's choice, i.e., exercise voluntary departure and abandon her right to judicial review, or petition this Court for review, and lose voluntary departure.

Petitioner argues that the imposition of this choice: (a) denied her due process since it chilled her constitutional and statutory right to petition this Court for a review of the original deportation order; and (b) was an abuse of discretion since Congress did not intend that voluntary departure be used to inhibit the exercise of good faith petitions for review of final orders of deportation.

A. The Board's Decision Granting Petitioner Voluntary Departure But Within Thirty Days Denied Petitioner Due Process Since It Chilled Her Constitutional And Statutory Right To Petition This Court For A Review Of The Original Deportation Order.

Access to the courts of the United States is a constitutional right guaranteed by the due process clauses of the Fifth, Fourteenth and First Amendments. Harbolt v. Aldredge, 464 F.2d 1243 (10th Cir. 1972), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, (1972); Evans v. Mosely, 455 F.2d 1084, 1087 (9th Cir. 1972); Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) Morales v. Thurman, 326 F.Supp. 677 (E.D. Tex. 1971). The right of access to the courts cannot be infringed upon or burdened. Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973); Silver v. Cormier, supra.

The due process clauses of the Fifth and Fourteenth Amendments apply to aliens within the United States, even if their presence here is illegal. Shaughnessy v. United States ex. rel. Mezei, 345 U.S. 206, 212 (1953). Consequently, aliens in the United States have constitutionally protected due process rights of access to the Courts which cannot be infringed upon or burdened.

Moreover, aliens have a statutory right to judicial

review of deportation orders if filed within six months from the date of the final order. 8 U.S.C. § 1105(a). This six month limitation on the period for filing a petition for review, recognizes the time necessary to prepare an appeal--a time often greatly in excess of the thirty days provided Petitioner for exercising voluntary departure.

However, even assuming arguendo that such a petition for review could be prepared and filed in thirty days, it could not be briefed, heard and decided in that period. Should a Petitioner exercise voluntary departure once a petition has been filed but not reviewed, the appeal would be considered withdrawn as this Court is without authority to review it. 8 U.S.C. §§1105(a)(c). Aleman-Fiero v. I.N.S., 481 F.2d 601 (5th Cir. 1973).^{14/} Consequently, the Board forces an alien

^{14/} This case is, therefore, distinguishable from Balonas v. I.N.S., 509 F.2d 1026 (2nd Cir. 1975). In that case an alien was requesting an extension of the date granted for voluntary departure in order to assert a claim for violation of his rights under the Civil Rights Act. The Court found that refusal of the district director to extend this date was neither unconstitutional nor an abuse of discretion since deportation would not have "unduly hampered" him from prosecuting his claim.

to choose between exercising voluntary departure and petitioning for review of the final deportation order. Petitioner chose to petition for review thereby losing her voluntary departure.

The loss of either the appeal or voluntary departure could have grave and lasting consequences for Petitioner. Had Petitioner exercised voluntary departure and forfeited her right to petition for review, petitioner would have been foreclosed from reversing the order of deportation enabling her to remain in this country. By exercising her right to petition for review, Petitioner forfeits the benefits of voluntary departure; for an alien who has been deported faces significant barriers to re-entry while an alien who has departed voluntarily, before a final order of deportation, faces none. ^{15/}

An alien who fails to depart within the time allotted for voluntary departure usually will not again be given permission to voluntarily depart. Gordon and Rosenfield, Immigration Law and Procedure, (rev'd ed. 1975), Section 7.2(c). Even if another opportunity for voluntary departure were granted after an unsuccessful appeal, departure under these circumstances is the equivalent of deportation. 8 U.S.C. §1101(g).

Section 212(a)(16)(17) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(16) and (17). Gordon and Rosenfield, Sections 2.33 and 7.7. Specifically, Gordon, et al. points out that exercising voluntary departure: (1) Avoids the

Similar statutory schemes and/or official action which infringe on an individual's access to the courts have been held unconstitutional. For example, in Silver v. Cormier, supra, the Tenth Circuit held that an urban renewal official's threat to withhold "going out of business" monies owed to plaintiffs, if they instituted litigation on a collateral matter, was unconstitutional since it burdened or chilled constitutional rights of access to the courts. The Court reached this decision even though the threat was never implemented. Id. at 163.

In Petitioner's case, the Board has withheld voluntary departure since Petitioner has exercised her right to appeal. The Board found the Petitioner statutorily eligible for voluntary departure and granted her application. Then after finding voluntary departure "due and owing" the Board's order limited the option to thirty days providing that it would be withdrawn without further notice if not exercised in that time. Since an alien must remain in this country to appeal (8 U.S.C. §1105(a)(c)), the

(footnote cont'd)
stigma of compulsory ejection; (2) Facilitates the possibility of return to the U.S. since one who is deported must get special permission to return and faces criminal penalties if she or he attempts to re-enter without this permission; and (4) Enables an applicant to select his or her destination. Id. Section 7.2

Board's order had the effect of threatening withdrawal of voluntary departure if Petitioner exercised her statutory right of appeal. This threat is no less chilling or burdensome because Petitioner chose to forfeit voluntary departure and appeal the deportation decision. Silver, supra 163. Having chosen to exercise a good faith appeal, Petitioner is now burdened by the fact that if she loses, she will be saddled with the readmission barriers of a deported alien.

The imposition of a more severe penalty for appealing a deportation order is similar to the one held unconstitutional in North Carolina v. Pearce, 395 U.S. 711 (1969). There the Supreme Court held that more severe sentences imposed on a defendant after appealing and undergoing a new trial denied the defendant due process of law when there was the likelihood of vindictiveness in resentencing. In its decision, the Court held:

Where as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights would be patently unconstitutional, United States v. Jackson 390 U.S. 570, 581. And the very threat inherent in the existence of such a punitive policy would with respect to those still in prison, serve to "chill the exercise of basic constitutional rights," Id. at 582. See also Griffin v. California, 380 U.S. 609; cf. Johnson v. Avery, 393 U.S. 483. But even if the first conviction had been set aside for unconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation

of due process of law . . . A court is "without right to put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered . . . It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." Worcester v. Commissioner, 370 F.2d 713, 718.

Id., at 724.

The Court reasoned that " . . . since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of a sentencing judge." Id. at 725.

In determining whether the likelihood of vindictiveness is present, courts should examine the total procedure as well as the specific facts of the case. United States v. Floyd, 519 F.2d 1031, 1034 (5th Cir. 1975).

An announced practice of imposing a heavier sentence upon every reconvicted defendant is one indication that such a system is constitutionally infirm. North Carolina v. Pearce, supra at 723.

The Immigration and Naturalization Service has an announced policy of not providing extensions of volun-

tary departure to enable individuals to pursue their right of appeal. This policy existed as far back as 1952 in Board of Immigration Appeals decision Matter of M, 4 IN 626 (Dec. 1952). There the Board stated that:

An alien should not be permitted to prolong his illegal presence in this country by failure to apply for or accept voluntary departure until he has brought his case, through various procedural steps, to the last authority where such relief may be granted.

Id. at 628.

Such an announced policy can only be considered vindictive and punitive and, therefore, unconstitutional. North Carolina v. Pearce, supra. This policy was discussed further in an unreported decision. Wong Ching Fui (BIA Aug. 21, 1969) cited in Fan Wan Keung v. I.N.S., 434 F.2d 301, 304-05 (2nd Cir. 1970):

The purpose of authorizing voluntary departure in lieu of deportation is to effect the alien's prompt departure without further trouble to the service. Both the alien and the Service benefit thereby. But if the alien does not depart promptly, so that the Service becomes involved in further and more costly proceedings by attempts to continue his illegal stay here, the original benefit to the Service is lost.

This policy on its face is punitive for it is expressly designed to discourage aliens from exercising their

statutory right of appeal.

While it may be legitimate for the Board to consider whether an applicant for voluntary departure has engaged in dilatory tactics it is not legitimate to establish an overbroad policy which penalizes aliens who do not resort to dilatory tactics but merely exercise their statutory right to appeal a final deportation order to the Courts of Appeals. Cf. Fan Wan Keung v. I.N.S.^{16/} supra. Such an announced policy can only be considered vindictive and, therefore, unconstitutional, North Carolina v. Pearce, supra.

B. The Board's Order Providing For "Voluntary Departure" But Within Thirty Days Was An Abuse Of Discretion Since Congress Did Not Intend That Voluntary Departure Be Used To Inhibit The Free Exercise Of The Right To Appeal.

The Attorney General has discretion to grant voluntary

^{16/} In Keung, supra, the Second Circuit held that a change of I.N.S. policy from liberally granting nunc pro tunc extension of expired voluntary departure time to reinstate the privilege of voluntary departure for an alien who had not departed within the initial period allowed him, to one refusal originally grant such extensions did not entitle aliens, who had not departed within the initial period granted and who had engaged in tactics, to reopen proceedings to reinstate voluntary departure. The instant case in contrast to Keung challenges the constitutionality and the basis of the voluntary departure policy. Petitioner, unlike the nine petitioners in Keung, is not engaged in a "purposeful pattern of delay." Petitioner raises good faith constitutional claims challenging her deportation and requesting reinstatement of voluntary departure in one appeal.

departure if an alien establishes a history of good moral character for five years prior to application for voluntary departure. 8 U.S.C. §1254(e). The Board's ultimate refusal to exercise this discretion once it finds an individual has good moral character is analogous to the Board's refusal to exercise discretion for an alien applying for suspension of deportation, where the facts are undisputed or properly founded. Therefore, the Court should use the same standards for review in both instances. The Second Circuit established these standards in Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2nd Cir. 1966) and reiterated them in Balonas v. I.N.S., 509 F.2d 1026 (2nd Cir. 1975). In Wang Wing Hang v. I.N.S., supra, the Court held that denial of suspension of deportation is reviewable for abuse of discretion. It further explained that an abuse of discretion would exist:

if . . . (they) were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or groups, or Judge Learned Hand's words, on other 'considerations that Congress could not have intended to make relevant' U.S. ex rel. Kaloudis v. Shaughnessy, supra, 180 F.2d at 491.

Id. at 719 (emphasis added).

There is no evidence that Congress intended that 8 U.S.C. §1254(e) be applied punitively or to discourage an alien from exercising one's statutory right to petition for review of a deportation order.^{17/} On the contrary, the "statute is intended to enable the Attorney General to ameliorate hardship and injustice . . ." 3A C.J.S. 8 210 95. See also Wadman v. I.N.S., 329 F.2d 812, 817 (9th Cir. 1964). The administrative authority to grant voluntary departure like other discretionary relief such as suspension of deportation is a "remedial device" to "avoid the rigor of deportation in deserving cases." Gordon and Rosenfield, supra, Section 7.1(a).

In 1961, Congress passed legislation to ameliorate abuse of the judicial process, where aliens sought to prolong and delay deportation by filing frivolous challenges to deportation. Congress accomplished this purpose in enacting a single, separate, statutory form

^{17/} U.S. Code Cong. and Adm. News 82nd Cong. 2nd Sess. 1653 (1952); U.S. Code Cong. and Adm. News 87th Cong., 2nd Sess. 4024 (1962); U.S. Code Cong. and Adm. News 89th Cong., 1st Sess. 3328 (1965).

of judicial review of administrative orders for the deportation and exclusion of aliens. H.R. No. 1086, U.S. Code Cong. and Adm. News 87th Cong., 1st Sess., 2950 (1961) provides:

The committee on the judiciary has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country.

Id. at 2967.

The lengthy and detailed expression of congressional intent included in this report concerning the use of judicial review as a dilatory tactic, rebuts any argument for implying a congressional purpose for implementing voluntary departure, when no similar expression for that provision exists. It is ironical that voluntary departure is used by I.N.S. to discourage aliens from exercising a statutory scheme expressly created to eliminate dilatory tactics.

This too violates congressional intent. For while expressing its intent to remedy unnecessary delays in deportation proceedings, Congress reaffirmed the right of an alien to judicial review of a finding of deportability. Id. at 2967. In setting out a uniform pro-

cedure for judicial review of deportation orders, Congress also built in safeguards to protect the due process rights of aliens. ^{18/} The total absence of such safeguards or limitations on the Attorney General's discretion to grant voluntary departure is further evidence that Congress did not intend that voluntary departure be used to discourage delaying tactics, much less to force a forfeiture of a good faith exercise of a statutory right of appeal.

The practice of granting voluntary departure for only thirty days to discourage aliens from petitioning

^{18/} "The committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater security, more assurance of a close study of his case by experienced judges." Id. at 2972.

"To make certain that the institution of the proceeding in the court of appeals shall not harm or be restrictive upon his desire for court review, the bill, as amended, declares that the review may be had upon the basis of a typewritten record and typewritten briefs." Id.

"The venue is designated in this section not only for the benefit of the United States but also for the good of the alien." Id.

"The section requires that a petition for review be filed within 6 months . . . This is not regarded as an undo limitation upon the alien . . . " Id. at 2973.

for review, is clearly an abuse of discretion as it is based on considerations Congress never intended to make relevant and adversely affects rights Congress expressly intended to preserve. Wong Wing Hang v. I.N.S., supra at 719.

Such a blatant abuse of discretion requires reinstatement of Petitioner's voluntary departure which is within the power of this Court. Khalil v. District Director of U.S. I.N.S., 457 F.2d 1276 (9th Cir. 1972). There a visitor to this country had overstayed her visa and was found deportable under 8 U.S.C. §1251(a)(2). After affirming the decision of I.N.S. relating to deportability, the Ninth Circuit modified the order of the immigration law judge to provide fifty more days to Khalil to make an authorized voluntary departure from this country.

SUMMARY

Petitioner has filed and pursued a good faith appeal of her final order of deportation. The exercise of this constitutional and statutory right has already cost her the opportunity to leave this country voluntarily, and could cost her the opportunity to be readmitted to this country should the court reject her other arguments.

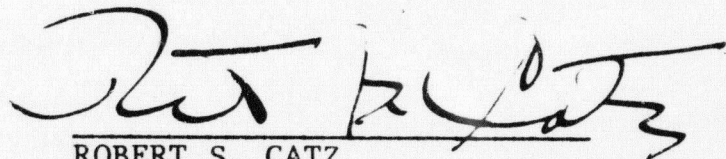
The I.N.S. cannot, as it has in Petitioner's case, put a price tag on the exercise of constitutional rights. It cannot, as it has in Petitioner's case, continue a practice totally lacking in congressional authority.

Consequently, the Board's decision granting Petitioner voluntary departure but within thirty days must be rejected as unconstitutional and an abuse of administrative discretion, and Petitioner's voluntary departure must be reinstated.

CONCLUSION

For the above stated reasons, the decision of the
Board of Immigration Appeals should be reversed.

Respectfully submitted,



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August 13, 1976

APPENDIX

Constitution

Amendment V.

[No person shall] be deprived of life, liberty, or property, without due process of law.

Statutes

8 U.S.C. §1101(g):

(g) For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

8 U.S.C. §1105a(a)(1) and (4):

Judicial review of orders of deportation and exclusion --
Exclusiveness of procedure

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that --

Time for filing petition

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

Determination upon administrative record

(4) except as provided in clause (B) of paragraph (5) of this sub-section, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive:

8 U.S.C. §1105(a)(c):

Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

8 U.S.C. §1102(a)(16) and (17):

Excludable aliens--General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation at a place outside the United States

or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their reapplying for admission:

(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this chapter or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to Section 1252(b) of this title, unless prior to their embarkation or reembarkation at a place outside the United States

8 U.S.C. §1251(a)(2):

Deportable aliens--General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who --

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States.

8 U.S.C. 1252(b):

Proceedings to determine deportability; removal expenses

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien.

If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that --

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. §1254(e):

Voluntary departure

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. §1362:

Right to counsel

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose.

Regulations

8 C.F.R. §242.2(a):

Apprehension, custody, and detention

(a) Warrant of arrest. At the commencement of any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to supervision under the authority contained in section 242(d) of the Act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest. However, such warrant may be issued by no one other than a district director, acting

district director, deputy district director, assistant director for investigations, or officer in charge of an office enumerated in §242.1(a), and then only whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable. If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to issue such warrant may authorize its cancellation. When a warrant of arrest is served under this part, the respondent shall have explained to him the contents of the order to show cause, the reason for his arrest and his right to be represented by counsel of his own choice at no expense to the Government. He shall be advised that any statement he makes may be used against him. He shall also be informed whether he is to be continued in custody or, if released from custody has been authorized, of the amount and conditions of the bond or the conditions under which he may be released. A respondent on whom a warrant of arrest has been served may apply to the district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in §242.1(a), for release or for amelioration of the conditions under which he may be released. The district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in §242.1(a) when serving the warrant of arrest and when determining any application pertaining thereto, shall furnish the respondent with a notice of decision, which may be on Form I-286, indicating whether custody will be continued or terminated, specifying the conditions, if any, under which release is permitted, and advising the respondent appropriately whether he may apply to a special inquiry officer pursuant to paragraph (b) of this section for release or modification of the conditions of release or whether he may appeal to the Board. A direct appeal to the Board from a determination by a district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge of an office enumerated in §242.1(a), shall not be allowed except as authorized by paragraph (b) of this section.

8 C.F.R. §242.8:

Special inquiry officers

(a) Authority. In any proceeding conducted under this part the special inquiry officer shall have the authority to determine deportability and to make decisions, including orders of deportation as provided by section 242(b) of the Act; to consider claims for relief from deportation under Articles 32 and 33 of the Convention Relating to the Status of Refugees, as amended by the Protocol Relating to the Status of Refugees; to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under sections 244, 245 and 249 of the Act; to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act to order temporary withholding of deportation pursuant to section 243(h) of the Act, and to take any other action consistent with applicable provisions of law and regulation as may be appropriate to the disposition of the case. A special inquiry officer shall have authority to certify his decision in any case to the Board of Immigration Appeals when it is an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act.

(b) Withdrawal and substitution of special inquiry officers. The special inquiry officer assigned to conduct the hearing shall at any time withdraw if he deems himself disqualified. If a hearing has begun but no evidence has been adduced other than by the respondent's pleading pursuant to §242.16(b), or if a special inquiry officer becomes unavailable to complete his duties within a reasonable time, or if at any time the respondent consents to a substitution, another special inquiry officer may be assigned to complete the case. The new special inquiry officer shall familiarize himself with the record in the case and shall state for the record that he has done so. [22 FR 9797, Dec. 6, 1957, as amended at 39 FR 17304, May 15, 1974]

8 C.F.R. §242.13:

Postponement and adjournment of hearing

Prior to the commencement of a hearing, the district director, acting district director, deputy district director, or officer in charge authorized to issue an order to show cause may grant a reasonable postponement for a good cause shown, at his own instance upon notice to the respondent, or upon request of the respondent. After the commencement of the hearing, the special inquiry officer may grant a reasonable adjournment either at his own instance or, for good cause shown, upon application by the respondent or the trial attorney. A continuance of the hearing for the purpose of allowing the respondent to obtain representation shall not be granted more than once unless sufficient cause for the granting of more time is shown. [28 FR 9504, Aug. 30, 1963]

8 C.F.R. §242.14(a):

Evidence

(a) Sufficiency. A determination of deportability shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.

8 C.F.R. §242.16(a);

Hearing

(a) Opening. The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in

the record. Deportation hearings shall be open to the public, except that the special inquiry officer may, in his discretion and for the purpose of protecting witnesses, respondents, or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public.

8 C.F.R. §242.16(b):

(b) Pleading by respondent. The special inquiry officer shall require the respondent to plead to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allegations and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent. The special inquiry officer shall not accept an admission of deportability from an unrepresented respondent who is incompetent or under age 16 and is not accompanied by a guardian, relative, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the special inquiry officer may not accept an admission of deportability, he shall direct a hearing on the issues.

8 C.F.R. §292.5(b):

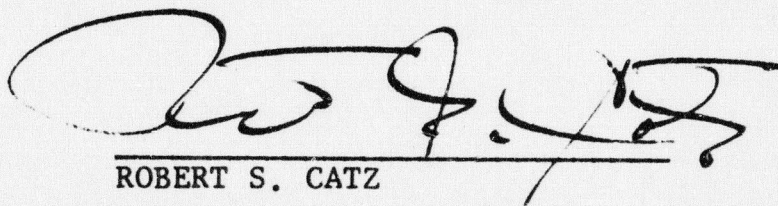
Service upon and action by attorney or representative of record.

(b) Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who, except as otherwise specifically provided in Part 332 of this chapter, shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs.

[23 F.R. 2673, Apr. 23, 1958, as amended at 34 F.R. 12213,
July 24, 1969; 37 F.R. 11471, June 8, 1972]

CERTIFICATE OF SERVICE

I do hereby certify that two copies of the foregoing Brief of Petitioner was mailed postage pre-paid to Mary P. Maguire, Assistant U.S. Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, New York 10007, this 12th day of August, 1976.



ROBERT S. CATZ